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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PACIFIC RIVERS COUNCIL,
Plaintiff,

v.

UNITED STATES FOREST SERVICE, *et al.*,
Defendants,
and

QUINCY LIBRARY GROUP, *et al.*,
Intervenor-Defendants.

Case No. CIV-S-05-0953 MCE/GGH

Related Cases: CIV-S-05-0205 MCE/GGH
CIV-S-05-0211 MCE/GGH
CIV-S-05-0905 MCE/GGH

MEMORANDUM OF INTERVENOR QUINCY LIBRARY GROUP AND PLUMAS COUNTY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PRC'S MOTION FOR SUMMARY JUDGMENT

Date: March 20, 2006
Time: 9:00 AM
Hon. Morrison C. England, Jr.

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INTRODUCTION

Plaintiff Pacific Rivers Council ("PRC" or "Plaintiff") challenges the adequacy of the National Environmental Policy Act ("NEPA") documents supporting the Forest Service's 2004 approval of the Sierra Nevada Forest Plan Amendment ("Sierra Framework" or "Framework"). *See* Mem. in Support of...PRC's Motion for Summ. J. (Oct 14, 2005) ("PRC Br."). QLG has intervened to assist in defending the 2004 Framework against PRC's claims. Under the approved briefing schedule, Federal Defendants have filed their opening briefing No. 05-593. The Quincy Library Group and Plumas County (QLG) have 20 pages in which to supplement the Federal Brief (Fed. Br.), which we do below. We adopt the statements of the case from the Fed. Br.

Pacific Rivers Council argues that the 2004 Sierra Nevada forest plan amendment ("SNFPA"), commonly referred to as the "2004 Framework," violates the Administrative Procedure Act ("APA") and the National Environmental Policy Act of 1969 ("NEPA"). However, as the administrative record demonstrates, each of Plaintiff's arguments lacks merit and should be rejected. Plaintiff's first claim--that the 2004 Framework violates NEPA for failing to analyze direct and indirect effects to aquatic ecosystems and species from the 2004 Framework (including activity related to roads, log landings, and skidtrails), Pl.'s Mem. at 16-29-- is forfeited in part, because Plaintiff did not raise critical aspects of its claim during the public comment period. As to the portions of Plaintiff's first claim not subject to forfeiture, the final supplemental environmental impact statement ("SEIS") for the 2004 Framework demonstrates that impacts to aquatic ecosystems from road and timber harvest activities were adequately analyzed under NEPA given the broad, programmatic role of a forest plan amendment like the SNFPA.

Plaintiff's cumulative effects claims (Pl.'s Mem. at 30) must fail, because Plaintiff has misconstrued the meaning of "cumulative" effects, thereby, rendering its claim unsubstantiated. In addition, because timber harvest and road activities were appropriately analyzed as direct and indirect effects of the 2004 Framework in the same manner as Plaintiff requests to be analyzed cumulatively, Plaintiff's cumulative effects claim must also fail. In any case, the SEIS did contain an adequate

analysis of cumulative effects related to these resources. Plaintiff also alleges that the 2004 SEIS violated NEPA because it does not adequately analyze mitigation measures. Pl.'s Mem. at 36. As with their other NEPA claims, this claim both ignores the different level of detail required in a programmatic EIS and is solidly refuted by the record. For these reasons, all of Plaintiff's NEPA claims should be dismissed.

ARGUMENT

I. Jurisdiction, Standard Of Review, The Rhodes Declaration, And Other Preliminaries The NFMA Does Not Require Absolute "Protection" Or Preservation.

The PRC Brief focuses on the Framework's impacts on riparian species and aquatic ecosystems. PRC does *not* contend that the Framework violates *substantive* environmental protections in the NFMA or NFMA rules. The Court should approach PRC's case using the standard presumption that the Forest Service is in compliance with the NFMA and other law. *Citizens to Preserve Overton Park v. Volpe*, 401.S. 402, 415-16 (1971); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). As PRC notes (at 3), the NFMA requires rules that insure timber harvesting "cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources." 16 U.S.C. 1604(g)(3)(F)(v). "Protection" under the NFMA does not mean protection of natural resources as they exist now or even as they "would exist without unreasonable impairment by humans." *Sierra Club v. Espy*, 38 F.3d 792, 800 & n.2 (5th Cir. 1994).

> The directive that national forests are subject to multiple uses, including timber uses, suggests that the mix of forest resources will change according to a given use. Maintenance of a pristine environmental where no species' numbers are threatened runs counter to the notion that NFMA contemplates both even and uneven-aged timber management.... That protection means something less than preservation of the status quo but something more than the eradication of species suggests that this is just the type of policy-oriented decision Congress wisely left to the discretion of the experts – here, the Forest Service.

38 F.3d at 800.

NEPA Is Strictly Procedural.

PRC brings claims that the 2001 EIS and 2004 supplemental EIS ("SEIS") on the Framework do not comply with NEPA and the Administrative Procedure Act ("APA"). PRC often implies that NEPA sets a substantive environmental policy (e.g., certain environmental impacts must be avoided or mitigated). That is not the law. The Supreme Court unanimously reversed the Ninth Circuit's attempt to impose substantive mitigation duties under NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-53 (1989), holds that NEPA imposes only procedural duties to disclose impact information.

The Standard Of Review Under NEPA Is Deferential To Federal Agencies.

The PRC Br. (at 18) correctly notes that NEPA documents are reviewed under a "rule of reason" to assess whether the EIS provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." The body of the PRC Br., however, argues for extraordinary detail in the SEIS that is inconsistent with a "rule of reason" and inconsistent with the NEPA regulatory directive to keep EISs under 150 pages (40 C.F.R. 1502.7). It is also inconsistent with the level of detail needed for a first-level programmatic EIS on the Framework.

Under Ninth Circuit authority, the "environmental impact statement review standard is limited and decidedly deferential." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). An EIS is adequate under a "rule of reason" if it contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206-07 (9th Cir. 2004); *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001); *Laguna Greenbelt, Inc. v. DOT*, 42 F.3d 517, 523 (9th Cir. 1994). A court essentially makes a "pragmatic judgment" on whether the EIS has reasonably fostered "informed decision-making and informed public participation," and the costs of requiring further EIS analysis. *Id*. Courts should not "fly speck" the SEIS and find it "insufficient on the basis of inconsequential, technical deficiencies." *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). "If the agency discusses the main environmental effects reasonably thoroughly, that's

enough." *City of Los Angeles v. FAA*, 138 F.3d 806, 807 (9th Cir. 1998).

The Litigation Declaration Of Mr. Rhodes Cannot Be Considered.

PRC has filed a 27-page Declaration of Jonathan J. Rhodes, and relies on it throughout the PRC Brief. The Declaration provides Mr. Rhodes' view as to why the SEIS is not adequate. Since the Declaration is dated Oct. 14, 2005 and cites to materials from late 2004, those materials were not before the agency at the time of its Jan. 21, 2004 ROD adopting the Framework. The Rhodes Declaration and the portions of the PRC Brief which rely on that Declaration cannot enter into the Court's decision for several reasons. First, the APA provides for review on the "record" before the agency at the time it made its decision. 5 U.S.C. 706. The judicial role is limited to assessing whether the agency was "arbitrary" in adopting the 2004 Framework, considering only the record facts before the agency at the time the Framework was adopted. Accordingly, the post-decisional Rhodes Declaration cannot be considered in assessing whether the Framework is arbitrary. *Southwest Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *see FPC v. Transcontinental Gas Line Corp.*, 423 U.S. 326, 331-33 (1976); *Envt'l Def. Fund v. Costle*, 657 F.2d 275, 284-86 (D.C. Cir. 1981). Second,

> the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. §706, to the agency decision based on the record the agency presents to the reviewing court.... The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

Hence, other reasons why the Rhodes Declaration cannot be considered are: (1) judicial review takes place on the record before the agency, not on competing litigation affidavits and other evidence first presented in court; and (2) in APA review, the Court does not act as a factfinder who weighs the technical issues discussed in the Rhodes Declaration. *See Cronin v. U.S. Dept. of Agric.*, 919 F.2d 439, 444 (7th Cir. 1990); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990).

The Rhodes Declaration and arguments based on that Declaration should not be considered for a third reason. PRC had ample opportunity to provide its version of the facts and science at the

agency level in comments on the draft SEIS (plus during the administrative appeal to the Forest Service Chief) – those materials become part of the administrative record for review in this Court. A court should not "topple over" the SEIS based on the post-decisional Rhodes Declaration. Instead, PRC is limited to citing material that it and others added to the administrative record in such comments.

> [O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts.... Simple fairness to those who are engaged in the task of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body has not only erred, but has erred against objection made at the time appropriate under its practice.

United States v. LA Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).

As the Supreme Court has held, this principle applies with full force to NEPA. Not only are plaintiffs limited to citing evidence before the agency at the time of its decision,[1] but they cannot obtain judicial review on issues they failed to preserve in NEPA comments. *DOT v. Public Citizen*, 124 S. Ct. 2204, 2213-14 (2004); *Vt. Yankee Nuc. Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551-54 (1978).

PRC Cannot Obtain Review On The Numerous NEPA Claims It Failed To Preserve At The Proper Time Before The Agency.

The "Third" reason described above also requires dismissal of NEPA claims that PRC neglected to preserve in its SEIS comments (or at least in its administrative appeal). This dismissal doctrine is sometimes called the "failure to exhaust administrative remedies." Under *Public Citizen*, 124 S. Ct. at 2213-14, and *Vt. Yankee*, 435 U.S. at 551-54, PRC cannot obtain judicial review where

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[1] In this age of weekly advances in our scientific knowledge and of evolving policy perspectives, it is not unusual for "new information [to] come[] to light after the EIS is finalized." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989). NEPA's answer is not to allow the EIS to be attacked based on such new information, as that "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id*. Instead, NEPA's answer is that a plaintiff can first suggest to the agency that the new information requires a supplemental EIS, and then bring an action in court for an SEIS if the agency declines. 490 U.S. at 372-78. PRC has not brought such a claim here based on the Rhodes Declaration.

its *comments on the draft SEIS* did not forcefully present alleged NEPA deficiencies to the agency for possible cure in the final SEIS. Under *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) "claims must be raised with sufficient clarity to allow the decisionmaker to understand and rule on the issue raised" and therefore PRC cannot obtain judicial review where its *administrative appeal* did not forcefully present alleged NEPA deficiencies to the agency for a possible cure that would avoid judicial review. A review of PRC's SEIS comments and administrative appeal reveals that PRC: (1) focused on alleged substantive violations of the NFMA, a roads policy, and the Clean Water Act; and (2) mentioned NEPA deficiencies quickly with respect to "road management" and a single sentence on "cumulative effects." PRC 92-120. In light of that record, we believe that PRC only preserved the NEPA claims regarding: (1) roads argued in the PRC Brief at 29-30 and 38-43; (2) fish argued in the PRC Br. at 23-24 (*see* PRC 110); and (3) the increased flexibility of certain guidelines argued in the PRC Brief at 29-30 (*see* PRC 110-11).

The remaining claims argued in the PRC Brief should be dismissed on exhaustion grounds. For example, PRC's SEIS comments and administrative appeal did not meaningfully alert decisionmakers to the alleged NEPA inadequacies on timber harvesting/thinning and grazing argued in the PRC Br. (at 19-23, 28-29, 32-44).[2] Since PRC's SEIS comments and administrative appeal did not mention "mitigation" measures, PRC did not preserve the mitigation claims argued in the PRC Br. (at 44-51). PRC's failure to preserve many of its claims may explain why PRC is so insistent on the degree of its prior participation. *see* PRC Br. at 13-15. PRC is attempting to shore up its

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[2] Logging and grazing are mentioned in the following "we also object to everything else" sentence in PRC's NEPA comments and agency appeal. "Further, the FSEIS fails entirely to evaluate the cumulative effects to aquatic ecosystems of roads, salvage logging, fuels management, livestock grazing, mining, herbicides, and recreational use that will occur withinthe planning area." PRC 113; *see* PRC 97 (similar sentence). At most, this sentence might provide notice of a claim that the "FSEIS fails entirely to evaluate the cumulative effects." Yet, that claim is not pursued by PRC and is disproven by the extensive SEIS discussion of the direct, indirect, and cumulative effects of the Framework at SNFPA 3256-3396. As in *Idaho Sporting Congress*, 305 F.3d at 965, PRC did not raise those claims "with sufficient clarity to allow the decisionmaker to understand and rule on the issue raised." *See* the dismissal of cumulative impact and other NEPA claims in *Public Citizen*, 124 S. Ct. at 2213-14; *Kleissler*, 183 F.3d at 203-05; *Habitat Ed. Ctr.*, 381 F. Supp.2d at 860-62; and *Shenandoah Ecosystems*, 144 F. Supp.2d 542, 556-57.

The single sentence that the SEIS "fails entirely to evaluate...logging" provides no fair notice of PRC's litigation claims that the EIS did address logging impacts, but did not address specific subtopics "adequately" or with enough quantification and detail (e.g., PRC Br. at 19-22).

inadequate prior identification of NEPA defects *post hoc* through the Rhodes Declaration. The Court should simplify the complex Framework cases by dismissing large portions of PRC's Complaint on exhaustion grounds.

II. PRC's Claims That The SEIS Does Not Satisfy NEPA's "Rule Of Reason" Are Unpersuasive

The PRC Brief asserts the SEIS does not adequately address the impacts of the timber thinning, road construction, and grazing allowed by (but not finally approved by) the Framework on riparian and aquatic environments. The same basic claims are argued at length by PRC as "direct and indirect impacts" and then as "cumulative impacts." PRC's repetition does not transform an adequate two-volume SEIS into one which fails NEPA's "rule of reason."

A. The SEIS Satisfies NEPA's "Rule Of Reason" On The Detail In A Programmatic SEIS

PRC insists the SEIS on the Framework is insufficient because it addresses the impacts of possible later timber harvesting (and road construction, and grazing) too generally, that NEPA requires "detailed" or "specific" or "quantified" environmental impact information "up front" in the SEIS, and that detailed analysis cannot be postponed until a second NEPA document analyzes the environmental impacts of a specific project of known dimensions. e.g., PRC Brief at 20-23 (timber thinning), 26-30 (roads), 37-50 (analyzing the same impacts under the rubric of "cumulative impacts" and "mitigation"). PRC's approach to NEPA compliance is based on the premise that a specific "increase in logging and road construction...is mandated by the 2004 Framework" (PRC Br. at 39), so the impacts of that "mandated" logging and road construction must be addressed in detail in the SEIS.

PRC is mistaken. As a unanimous Supreme Court opinion holds, a forest plan (or, here, the Framework's regional amendments to 11 forest plans) "does not itself authorize the cutting of trees" or "abolish anyone's legal authority to object to trees being cut." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30, 733 (1998). While a forest plan (or, here, the forest plan amendments) "makes logging more likely in that" a plan's allowance of timber harvesting is a "logging precondition," a forest plan does not mandate achievement of a specific timber production level (e.g., forest plans can be amended under 16 U.S.C. 1604(f)(4)). *Ohio Forestry,* 523 U.S. at 730. Federal land use plans provide

projections of activity levels expected in the future, but those expectations are not normally enforceable. *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2382-84 (2004). An environment-disturbing activity (here, timber thinning, road construction, or grazing) may be approved only after the forest plan-level document is issued and after a NEPA document "evaluate[s] the effects of the specific project," – and, that NEPA document may be separately challenged by an affected environmental group. 523 U.S. at 729-30, 733-34. This two-tiered structure allows the Forest Service to: (1) first prepare a NEPA document generally assessing the impacts of adopting different alternatives as the overall forest plan program; and (2) later prepare a more specific project-level NEPA document. 40 C.F.R. 1502.4, 1502.20. Under the controlling NEPA rules, each document can "focus on the actual issues ripe for decision at each level." *Id.* § 1502.20.

Accordingly, PRC has no basis to demand detailed NEPA analysis of the impacts of possible later *project-level* actions in the SEIS on adopting a *programmatic* Framework for managing 11 Sierra Nevada national forests. PRC's approach should be rejected as not being required by NEPA, for the following reasons:

1. Most of the cases PRC cites concerned EISs on the project-level decision that authorized disturbance of the environmental status quo at a site-specific location.[3] Where a site-specific project of known dimensions and with known mitigation measures will occur at a known location, its environmental impacts can be quantified to a greater extent.

2. In an EIS addressing which overall *program* should be adopted (e.g., alternative S1 or S2 for the Framework covering 11 national forests), the degree of detail and quantification that is reasonable under NEPA's "rule of reason" is decreased. The programmatic "EIS analysis may be more general than a subsequent EA analysis." *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002). "NEPA does not require a particularized assessment" in an EIS on a forest plan (or here, on

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[3] *See The Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989 (9th Cir. 2004); *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142 (9th Cir. 1997); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Found. for North American Wild Sheep v. U.S., Dept. of Agric.*, 681 F.2d 1172 (9th Cir. 1982); *Sierra Nevada Forest Prot. Campaign v. U.S. Forest Serv.*, 2005 WL 1366507 (E.D. Cal. 2005).

amendments to 11 forest plans) – that EIS may lawfully be largely or "merely 'programmatic." *Idaho Cons. League v. Mumma*, 956 F.2d 1508. 1522-23 (9th Cir. 1993); *see Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003) (collecting many other decisions to the same effect). PRC's desire to address environmental impacts "at an early stage" must be "tempered by the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences." *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The Ninth Circuit established the controlling precedent that a forest plan-level EIS need not address water quality impacts with great specificity in an earlier decision:

> In insisting on more specific water quality data, Resources Limited relies on.... [a] case [that] concerned a site-specific, not forest-wide, plan.... We are convinced that such specific analysis is better done when a specific project is to be taken, not at the programmatic level.

Resources Ltd. v. Robertson, 35 F.3d 1300, 1306 (9th Cir. 1993).[4] *Block*, 690 F.2d at 762-63, found that, because the national forest system-wide decision eliminated the "discretion to manage a Nonwilderness area in a manner consistent with wilderness preservation," there was a critical decision against Wilderness designation that had to be addressed in detail in the EIS. In contrast, the Framework plan amendment makes no final "go/no go" decision on particular forest thinning projects, on particular road construction, or on particular grazing permits. Those later projects will have their own NEPA analysis (e.g., the Basin Project EIS challenged by the Campaign). *See Ohio Forestry*, 523 U.S. at 729-33; *Friends of Yosemite Valley v. Norton*, 348 F.3d at 800-01. Accordingly, the closest Ninth Circuit precedents do not require a high level of quantification or detail in the initial EIS at the Framework or program level.

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[4] This NEPA "rule of reason" reflects the pragmatic. At the time the long-term forest plan is prepared, the site-specific location and prescriptions on a particular project are not fully known (they will be proposed and analyzed later). Yet, those site-specific details control the type and magnitude of environmental impacts. As a result, under a structure where a long-term forest plan does not compel later ground-disturbing actions and all constraints, the NEPA document on the plan simply cannot quantify implementation impacts or describe them with great specificity.

3. PRC is correct that the 2004 Framework provides greater flexibility to design projects at the site-specific level, and imposes fewer hierarchical constraints at the regional level. E.g., PRC Br. at 8-11, 30.

The greater flexibility has implications for the degree of detail that is reasonable under NEPA's "rule of reason" in the regional SEIS. The absence of some regionally-fixed constraints in the 2004 Framework means that, on each project, each Forest Supervisor has the flexibility to adopt the types of constraints included in the 2001 Framework, include some other type of mitigation measure, or include no mitigation. Because the 2004 Framework does not "foreclose later" adoption of mitigation measures for a particular project, the generalized comparison of impacts in the SEIS satisfies NEPA. *Northern Alaska Envtl. Coal. v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992). The absence of fixed region-wide constraints does not mean that no constraints will be adopted at the project level. Because those project-specific decisions on mitigation will not be made until later, this means that the site-specific environmental impacts simply cannot be predicted with detail and accuracy in the SEIS on the Framework.

4. PRC's argues that this NFMA-compliant structure for forest plan and project decisions somehow violates the procedural NEPA. Those arguments are not persuasive. NEPA cannot be read as requiring that a complete set of projects and constraints be set in a regional Framework so their impacts can be quantified to a greater degree in an EIS on the Framework. That would improperly transform NEPA into a substantive statute on when agencies must make certain decisions. *Methow Valley*, 490 U.S. at 349-53; *Oregon Nat. Res. Council v. Lowe*, 109 F.3d 521, 529 (9th Cir. 1997). That reading would also result in "judicial entanglement in abstract policy" issues (e.g., Executive Branch priorities, cost issues) "which courts lack both expertise and information to resolve." *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381 (2004). . It would "inject[] the judge into day-to-day agency management" in a way not authorized by the APA and background separation-of-powers principles. *Id.* Instead, an Executive Branch agency has the authority to set its own priorities and the scope of regional versus site-specific decisions. *Mobil Oil Expl. & Prod. SE, Inc. v. United Distribution Cos.* 498 U.S. 211, 230-31 (1991). A court cannot

"dictate to the agency the methods, procedures, and time dimensions of the needed inquiry." *Vt. Yankee*, 435 U.S. at 545.

Thus, the Court should not find that NEPA requires a quantification of project level impacts in the Framework SEIS, or that NEPA forces the agency to adopt region-wide standards and commit to specific projects that are necessary to quantify and provide detail on certain impacts. The regional SEIS procedurally satisfies NEPA's "rule of reason" by providing the level of detail: (1) that is reasonable, given that the fewer regional standards and regionally-compelled projects means that less quantification of impacts is possible in the regional SEIS; (2) that provides a basis for comparing the environmental impacts of the regional alternatives (e.g., the 2001 Framework (S1) and the 2004 Framework (S2)), given that there will be later NEPA documents addressing the site-specific impacts of particular logging, road construction, and grazing projects; and (3) that provides "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decisions actually being made at the regional level. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206-07.

Nor does NEPA require that the environmental impacts of possible later actions implementing the Framework be addressed in substantial detail in the SEIS. Instead, under controlling Supreme Court authority, courts cannot dictate that the impacts of possible future actions that are not yet "proposed actions" must be addressed in an early EIS. *Kleppe v. Sierra Club*, 427 U.S. 390, 401-15 (1976). The level of quantification of impacts provided in a program-wide EIS involves issues of cost, the "interrelationship among proposed actions and practical considerations of feasibility" – such issues are "properly left to the informed discretion of the responsible federal agencies" and should not be second-guessed by courts. *Kleppe,* 427 U.S. at 412; *see Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1184-85 (9th Cir. 2000).

Accordingly, PRC's view (at 22) that "NEPA does not permit deferral of the [detailed and quantified] consideration of direct and indirect impacts to a future date, as the SEIS does here" is legally mistaken.

5. The SEIS satisfies NEPA's "rule of reason" for a programmatic EIS for other reasons as well. While a normal EIS should not exceed 150 pages (40 C.F.R. 1502.7), volume 1 of the SEIS

provides 334 pages describing the Framework alternatives and their likely impacts on old forest ecosystems, forest health, aquatic and riparian ecosystems, fire and fuels, air quality, soil quality, individual species of the Sierra Nevada, commercial forest products, grazing, roads, and recreation. Additionally, volume 1 provides 100 pages of appendices. Volume 2 of the SEIS provides at least 500 pages of public comments and detailed responses to public comments. And, this SEIS is just a *supplement* to a multi-volume 2001 EIS which provides thousands of more pages of information on the regulatory context and impacts.

Moreover, in instance after instance, the PRC Brief provides citations to pages of the SEIS where the impacts of concern to PRC were disclosed and analyzed. PRC simply disagrees with the analysis and would prefer different conclusions. NEPA does *not* contain substantive standards, but merely procedural disclosure of potential impacts. Thus, the SEIS complies with NEPA as it provides "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *City of Sausalito*, 386 F.3d at 1206-07 (9th Cir. 2004).

B. The SEIS Adequately Describes The General Impacts Of Timber Harvesting And Fuels Management, And Road Construction, On Aquatic And Riparian Species And Environments

The PRC Brief (at 19-32, and 38-43) raises a series of claims that the SEIS does not satisfy NEPA's rule of reason by disclosing the significant impacts of the timber harvesting and fuels management and road construction potentially allowed by the Framework on aquatic and riparian species and environments. None of those claims has merit.

1. The Timber Thinning And Harvesting Claims

The Court is likely to find that PRC did not preserve any claims regarding *timber thinning and harvesting*, including log skid trails and long landing sites. Accordingly, we proceed fairly quickly through the merits of those claims, which PRC argues at 19-23, 28-29, and 37-43.

1. PRC emphasizes (at 19-23) that the 2004 Framework increases timber production (it does so by fully implementing the QLG Pilot Project authorized by Congress) and increases forest

thinning, when compared to the 2001 Framework.[5] The SEIS describes the increased timber harvesting and thinning, and describes its impacts on aquatic and riparian species and environments. E.g., SNFPA 3120-51, 3277-85, 3305-11, 3356-62, 3366-78, 3386-97. PRC admits that the SEIS disclosed environmental impacts, but disagrees with the analysis and conclusions. There clearly has been a procedurally-adequate disclosure of impacts.

2. PRC also contests the accuracy of the SEIS's description of impacts from the S2 program. E.g., PRC Brief at 21 ("The FSEIS attempts to downplay the true impact of the staggering increase in the amount of logging" potentially allowed under the Framework), 32 (the SEIS "overstates the anticipated benefits from the additional fuel treatment" in reducing risks of large wildfires). Yet, the SEIS accurately describes that the 2004 Framework "may pose higher short-term risks to aquatic resources because it prescribes larger amounts of mechanical treatments," but those risks "will be greatly reduced through the application of the...Aquatic Management Strategy" or AMS. SNFPA 3169; *see* SNFPA 3282 (effects on aquatic ecosystems and water quality...should be of limited magnitude, duration, and extent"). As documented in the footnote below, the SEIS provides a logical explanation for why the aquatic impacts are unlikely to be as severe as PRC fears.[6]

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[5] PRC (e.g., at 4-5) makes clear its dislike of the Herger-Feinstein Quincy Library Group Forest Recovery Act ("QLG Act"), 112 Stat. 2681-305 to 310 (1998). However, policy decisions regarding the management of federal lands are for Congress (which has nearly absolute authority under the Property Clause) and the Forest Service (when acting consistent with legislative direction). The QLG Act reflects Congress' desire to conduct a QLG Pilot Project in three national forests to test the effectiveness of tree group selection in providing timber production and reducing fire risks, while still protecting environmental attributes. *See* 112 Stat. 2681-305 to 307; H.R. Rep. No. 105-136, pt. 1, at 4-6. Though PRC paints the Pilot Project as being environmentally insensitive, QLG Act § 401(c) contains provisions protecting riparian areas, limiting locations of roads, protecting CASPOs, etc. *See id.* Certainly, it was not "arbitrary" to structure the 2004 Framework so that it carries out the QLG Pilot Project as Congress anticipated . And, protecting local communities from catastrophic wildfires also is in the public interest, as illustrated by the fire-reduction purposes of the National Fire Plan and the Healthy Forests Restoration Act of 2003, 16 U.S.C. 6511-91.

PRC focuses on the fact that the 2004 Framework increases timber production when compared to the 2001 Framework. Yet, the 2004 Framework dramatically lowers timber production levels when compared to what the 11 forest plans found to be in the public interest (to maximize net public benefits).

[6] First, projects will include Best Management Practices or "BMPs, certified by the State Water Resources Control Board and certified by [EPA], to achieve compliance with applicable provisions of water quality plans." SNFPA 3281. Fuel "treatments could have minimal adverse effects on aquatic ecosystems and water quality if they are carefully designed and implemented according to [BMPs) (MacDonald and Stednick 2003)." SNFPA 3278. Second, "sediment sources would be minimized by application of Soil Quality Standards and BMPs, both of which have been shown to be effective." SNFPA 3281. Third, the AMS also includes Riparian Conservation Areas, which may mean that fuels treatments will be "less intensive within RCAs....especially...RCAs closest to watercourses." *Id.*

Further, PRC's attempt to override the Forest Service's judgment on the severity of aquatic impacts should fail as a matter of law. NEPA does not "contemplate[] that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe*, 427 U.S. at 410 n.21. "When specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council,* 490 U.S.360, 378 (1989); *see id*. at 379-85 (the Corps made no "clear error of judgment" in finding new information lacked environmental significance for a supplemental EIS).

3. The PRC Brief (at 28-29) seems to argue that, depending on where log skid trails and landing sites are located and which BMPs and other mitigation measures are applied, those aspects of timber thinning and harvesting can have significant or insignificant environmental impacts. This is disclosed in the SEIS. e.g., SNFPA 3281. The Forest Service can lawfully defer further analysis until a timber project of known location and dimensions is proposed and analyzed in a NEPA document (e.g., the EIS on the Basin Project).

2. The Fish Claims

PRC argues (at 22-24) the SEIS fails to discuss impacts on certain frog and *fish* species. PRC preserved only the fish issues. With respect to fish species, the SEIS explains that the 2004 Framework's impacts would be similar to those discussed in the 2001 EIS modified alternative 8 (the 2001 Framework), so further evaluation in this *supplemental* EIS is not required. SNFPA 3486, 3491-93. Thus, adequate NEPA coverage on fish is provided by the 2001 EIS, Vol. 3, pages 1-4, 40-66, 111-25, and 246-65, and Vol. 4, Appendix R. *See* PRC 153.

In addition to incorporating the 2001 EIS, the SEIS also incorporates the biological assessment which "considered potential [e]ffects of alternative S2 on ten species of fish and their critical habitat." SNFPA 3486. SNFPA 3238. Those impacts are addressed at SNFPA 2659-69, 2776-2806, 2907-10. Such incorporation is encouraged by NEPA rules. 40 C.F.R. 1502.21. Thus,

the discussion of fish impacts was adequate. The EIS is adequate because it contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" (*City of Sausalito*, 386 F.3d at 1206-07), and an EIS does not have to describe minor or non-existent impacts. If any site-specific project is proposed which would adversely impact frogs or fish, PRC can insist on an adequate NEPA analysis at that time.

3. The Road Impact Claims

The PRC Brief (at 24-28, 29-30, 41-43) argues the SEIS fails to assess the impacts of increased *road* construction and use. Yet, its citations to the impact discussions in the SEIS prove that those impacts were disclosed, not ignored. PRC also engages in histrionics on the linear miles of road construction. Over 10 years, the 2004 Framework anticipates 115 miles of new roads, largely to implement the QLG Pilot Project as anticipated by Congress and to provide access for forest thinning to reduce fire risks. Thus, the roads are for sound public purposes. Further, this 115 miles is spread out over millions of acres in 11 national forests. And, as the Framework anticipates decommissioning and replanting more road miles than would be constructed or reconstructed, the net impacts on roads and aquatic ecosystems is minor. SNFPA 3084, 3282-83, 3394-95.

PRC's real beefs (at 25-26, and 41-43) are that the SEIS "fails to ["quantify" and] analyze the specific impacts to aquatic ecosystems" from particular roads, and that allegedly NEPA bars "deferring analysis of the impacts from road construction" until there is a specific road construction proposal to analyze. Yet, NEPA rules, and Supreme Court and Ninth Circuit precedents, allow deferral of impact analyses which are contingent on which site-specific projects are approved until a site-specific project of known dimensions is actually proposed. The Framework plan amendment, like most forest plans, does not make decisions on constructing or reconstructing roads. *See Ohio Forestry*, 523 U.S. at 738-39. As a result, the SEIS cannot cumulate quantitatively the "cumulative impacts" of future projects when the site-specific locations of and constraints on those projects are not known. Further, courts "don't require an agency to quantify all possible effects, particularly not those that are likely to be minor." *City of Los Angeles v. FAA*, 138 F.3d 806, 808 (9th Cir. 1998). The SEIS complies with NEPA's "rule of reason" by generally describing road construction and use

impacts at a level reasonable for the programmatic Framework. *See* SNFPA 3278-85, 3394-97. With respect to road reconstruction and use, the SEIS reflects the Forest Service's view that:

> many road reconstruction projects are undertaken to improve water quality and aquatic habitat over the longer term (years to decades), through improvements such as rocking, surface drainage such as outsloping, and stream crossing improvements to reduce sedimentation risks associated with failures and to improve passage for aquatic organisms. Such improvements are expected to reduce the road related effects previously described.

SNFPA 3282-83.

Because the Forest Service's expert opinion is that the net effect of road reconstruction and greater existing use would be minor, that topic did not require extended discussion in an SEIS focused on disclosing the major "significant" impacts and the differences from the 2001 Framework.

3. The Mitigation Claims

The PRC Brief (at 44-51) alleges the SEIS inadequately addresses *mitigation* measures. Since PRC did not notify the Forest Service of "mitigation" issues in its SEIS comments or administrative appeal, those issues have been waived.

If the Court reaches the merits, these claims should be dismissed for both factual and legal reasons. Factually, the record shows the SEIS addresses mitigation measures concerning aquatic resources. For example, the preceding point quotes from the SEIS on mitigating road impacts through better construction techniques and decommissioning/replanting of old roads. Footnote 6, above, provides citations where the SEIS describes how the use of BMPs, soil protection standards, and the aquatic management strategy have proven to be effective in the past and would mitigate significant adverse impacts to aquatic resources. The actual mitigation measures for aquatic and riparian ecosystems are described in greater detail in Appendix A of the SEIS. *See* SNFPA 3407-21 and 3428-29. The record here on mitigation measures is unlike that in PRC's cited decision (at 45-46) of *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998), where the "Forest Service did not even consider mitigation measures." The description and analysis of mitigation measures in the SEIS, like those at issue in *Carmel-by-the-Sea*, 123 F.3d at 1152-54, satisfy NEPA's "rule of reason."

PRC seems to believe that, due to increased local flexibility to design site-specific projects and mitigation measures under the 2004 Framework, fewer universally-applicable mitigation

measures are described in the NEPA document on the Framework. This substantive policy by the Regional Forester in favor of flexibility does not violate the procedural NEPA. Because the Framework does not irretrievably commit to specific projects without any mitigation, "the detailed analysis of mitigation measures and cumulative effects demanded by [Plaintiff] is unwarranted at this stage." *Northern Alaska*, 961 F.2d at 891. Instead, discussion of site-specific "mitigation measures" can be deferred until "later [NEPA] analysis" of a particular project, and it must be assumed that the agency will comply with NEPA at that stage. *Id*. In contrast, *Cuddy Mt.* and PRC's other lead cases on discussing mitigation measures in a NEPA document concern site-specific projects which are the "go/no go" point for adopting mitigation measures and addressing them in a NEPA document.

4. The Change In Guidelines Claim

PRC (at 30-32) also pursues the argument that, though the increased flexibility in the 2004 Framework is lawful, the Framework's changes in guidelines (from the 2001 version) were inadequately addressed in the SEIS. Yet, the SEIS describes these changes at SNFPA 3097-3102, 3120-60, 3277-84, and 3405-59. The impacts of those changes are analyzed throughout the SEIS.

One PRC charge is that the SEIS "completely fails to the extent to which replacing the mandatory language and specific restrictions of the 2001 Framework with vague and flexible guidelines and post-approval analysis in the 2004 amendments will result in adverse" impacts to aquatic species and their habitat. The "completely failed" rhetoric is inaccurate. The main purpose of chapters 2 and 4 of the SEIS is to describe the impacts of the different standards in the 2001 versus 2004 Framework, to the extent they can be described.

Still, due to the greater site-specific flexibility preserved in the 2004 Framework, the degree to which the 2001 and 2004 Frameworks will have different impacts on-the-ground often cannot be accurately predicted. PRC apparently urges that the SEIS assume the worst case – that where the 2004 Framework does not include a former specific mitigation measure, that no comparable mitigation measure will be adopted in a project under the 2004 Framework. But, NEPA does not require a worst-case analysis. Instead, NEPA allows the SEIS's approach of describing areas of uncertainty on the level of environmental impact. 40 C.F.R. 1502.22; *Methow Valley*, 490 U.S. at

354-56. Further, because the 2004 Framework does not "foreclose later" adoption of mitigation measures for a particular project, the generalized comparison of impacts in the SEIS satisfies NEPA. *Northern Alaska*, 961 F.2d at 891.

Next, PRC (at 31) alleges that "numerous changes to the 2001 Framework are not even mentioned in the SEIS at all." Yet, its examples all come from Appendix A's comparison of the guidelines included in the 2001 versus the 2004 Framework. Further, with respect to the riparian vegetation example cited by PRC, since the 2004 Framework replaces a mandatory directive with the flexibility to still follow that directive on particular projects, the incremental environmental impact (if any) cannot be predicted in the SEIS.

5. The Cumulative Impact Claims

PRC alleges deficiencies in the SEIS's treatment of the *same impacts* of implementing the Framework first as "direct and indirect impacts" (PRC Br. at 19-32), and then as "cumulative impacts" (PRC Br. at 36-44). PRC is misusing the term "cumulative impacts." PRC's case concerns the environmental impacts caused by ground-disturbing projects implementing the 2004 Framework. Such impacts are "indirect effects" of adopting the Framework, as they are "caused by the [Framework] action," in the sense that site-specific projects are authorized by and must be consistent with SNFPA, yet the projects will be approved "later in time" after the 2004 adoption of the Framework's amendment to forest plans. 40 C.F.R. 1508.8(b); *see Public Citizen*, 124 S. Ct. at 2215-17; *Ohio Forestry*, 523 U.S. at 729-30, 733-34.

"Cumulative impact" does not refer to the impacts of implementing the proposed action (here, projects implementing the Framework). Rather, it is the cumulated total "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency...or person undertakes such other actions." 40 C.F.R. 1508.7. Since PRC does not argue the SEIS failed to address the cumulative effect of the Framework's authorized actions plus some other set of actions, PRC has no legitimate "cumulative impact" claim. *See Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 763-64 (9th Cir. 1996).

This, in turn, means that the "cumulative impact" claims in the PRC Br. (at 36-44) should be dismissed because they do not concern cumulative impacts as defined in controlling rules.[7] Instead, those claims might only be maintained as claims that the SEIS failed to adequately address the "direct and indirect impacts" of the Framework, which is what PRC attempts to do at 19-36. But, since PRC did not preserve any "direct and indirect impact" claims at the agency level, other than "roads" claims, most of the claims in the PRC Br. (at 19-36) should be dismissed for failures to exhaust and to timely alert the agency.

The 2004 Framework Should Not Be Set Aside Based On The Claims In The PRC Brief

PRC seeks to have this Court accomplish the its political goals of enjoining the 2004 Framework adopted by the Executive Branch and the Forest Service, and reinstating the 2001 Framework. QLG believes that the appropriate remedy for any curable legal error is declaratory relief, accompanied by a remand that preserves the Executive Branch's discretion. Reasons for that position follow: (1) Most of PRC's claims concern curable procedural errors (e.g., inadequate explanations, inadequate NEPA disclosure, inadequate wildlife monitoring). The 2004 Framework should not be enjoined for such curable procedural defaults. *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 2003); (2) some of PRC's claims against the 2004 Framework apply equally to the 2001 Framework Where there are defects common to both the 2001 and 2004 Frameworks, there is no rational basis for setting aside the 2004 Framework and reinstating the 2001 Framework; (3) if there has been a failure to adequately monitor aquatic species and ecosystems, the curative remedy is to direct the completion of

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[7] To the extent PRC has raised credible cumulative impact issues, the Court should recognize any NEPA duty to assess the cumulative impacts of *other* projects is quite limited. A NEPA document should focus on the impacts of the proposed action that the agency can control, and the "'cumulative impact" regulation does not change this analysis." *DOT v. Public Citizen*, 124 S. Ct. 2204, 2215-16 (2004). Indeed, NEPA "regulations do not explicitly require an EIS to include a discussion of cumulative impacts." *Selkirk Cons. Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003). The duty created by case law should be tempered so that the cumulative impacts of other actions do not drown out the more-useful information on the incremental impacts of the action actually under consideration and agency control. *Id*. at 958-63.

Further, where there are multiple, but independent, implementing projects, the cumulative impact analysis can be deferred to the NEPA document on the later-in-time project. *Kleppe*, 427 U.S. at 410 n.20 & 415-16 n.26; *Idaho Cons. Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998)..

the required level of wildlife monitoring. The APA specifies the "relief for a failure to act in § 706(1): 'the reviewing court shall...compel agency action unlawfully withheld or unreasonably delayed.'" *Southern Utah Wilderness All*, 124 S. Ct. at 2378; and, (4) a prerequisite to obtaining extraordinary injunctive relief is plaintiffs must show that their desired injunction is necessary to avoid irreparable injury. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-14 (1982). The Ninth Circuit's earlier approach of "presuming" that all environmental injuries are irreparable was reversed as being "contrary to traditional equitable principles" in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-45 (1987). The "Supreme Court has held that insufficient evaluation of environmental impact under NEPA does not create a presumption of irreparable injury." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1299 (9th Cir. 2003).

Instead, Plaintiffs bear the burden of demonstrating that some environmental injury of "long duration" is "sufficiently likely" to satisfy the "irreparable" injury prerequisite. *Earth Island*, 351 F.3d at 1299. The harvesting of some trees is, by itself, "not irreparable" since, though some "trees will be cut; new trees will grow in their place." *Sierra Club v. Robertson*, 784 F. Supp. 593, 601 (W.D. Ark. 1991). Since plaintiffs are not "legally entitled to demand 'unmanaged wildlife,'" the fact that the challenged actions would actively manage some lands does not show irreparable injury. *Greater Yellowstone Coalition v. Babbitt*, 952 F. Supp. 1435, 1445 (D. Mont. 1996). The "proper inquiry is whether the area and the forest *as a whole* would be harmed by the Forest Service's overall management plan." *Krichbaum v. U.S. Forest Serv*., 991 F. Supp. 501, 507 (W.D. Va.1998). Since PRC's opening brief does not sustain a Plaintiff's burden of persuasion any of the elements of disfavored injunctive relief, the 2004 Framework should not be enjoined.

CONCLUSION

PRC's motion for summary judgment should be denied. The Complaint should be dismissed.

Respectfully submitted on January 6, 2006

s/ Michael B. Jackson

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Quincy Library Group